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13 KIMBERLY-CLARK WORLDWIDE, INC.; KIMBERLY-

14 CLARK GLOBAL SALES, LLC

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 DIANNA JOU and JAYNRY YOUNG,
individually and on behalf of other similarly
19 situated individuals,

20 Plaintiffs,

21 v.

22 KIMBERLY-CLARK CORPORATION;
KIMBERLY-CLARK WORLDWIDE, INC.;
KIMBERLY-CLARK GLOBAL SALES,
23 LLC; and DOES 1-5.

24 Defendants.
25

26 Case No. C13-cv-03075 JSC

27 **DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT OR, IN THE
ALTERNATIVE, MOTION TO STRIKE**

28 Date: October 31, 2013

Time: 9:00 a.m.

Judge: Magistrate Judge Jacqueline Scott
Corley

Complaint Filed: July 3, 2013

1 Defendants Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc., and
 2 Kimberly-Clark Global Sales, LLC (collectively, “Defendants”) respectfully request judicial
 3 notice of Exhibits A and B, attached hereto, consisting of true and correct copies of page proofs
 4 of product packaging labels for Huggies® Pure & Natural Diapers and Huggies® Natural Care
 5 Baby Wipes (“the Products”). The Court may properly consider these product packaging images
 6 in ruling on Defendants’ motion to dismiss and/or strike the Complaint because these labels form
 7 the foundation of Plaintiffs’ claims and Plaintiffs reference and rely on these labels throughout
 8 their Complaint.

10 A court may consider documents attached to the complaint, documents incorporated by
 11 reference in the complaint, or matters of judicial notice without converting a motion to dismiss
 12 into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
 13 2003). This Court may take judicial notice of the product packaging labels attached as Exhibits
 14 A and B for two primary reasons:

16 ***First***, the packaging of the Products is “incorporated by reference into [the] complaint”
 17 because “the plaintiff refers extensively” to the labels in the Complaint and the labels “form[] the
 18 basis of the plaintiff’s claim.” *Id.* On a motion to dismiss, a court may take judicial notice of a
 19 document on which the complaint “necessarily relies” if “(1) the complaint refers to the
 20 document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
 21 authenticity of the copy attached to the 12(b)(6) motion.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
 22 F.3d 992, 998 (9th Cir. 2010). The labels attached in Exhibits A and B clearly form the basis of
 23 Plaintiffs’ claims, as California courts have commented that “‘the primary evidence in a false
 24 advertising case is the advertising itself.’” *Hairston v. South Beach Bev. Co.*, No. CV 12-1429-
 25 JFW, 2012 U.S. Dist. LEXIS 74279, at *11 (C.D. Cal. May 18, 2012) (quoting *Brockey v.*
 26 *Moore*, 107 Cal. App. 4th 86, 100 (2003)). Additionally, Plaintiffs refer extensively to the
 27
 28

1 packaging of the Products and the representations contained therein. *See, e.g.*, Compl. ¶ 22
 2 (“The packaging for the Products misrepresent that the Products will benefit the environment and
 3 end user in a variety of ways.”); *see also id.* ¶¶ 23, 31, 33, 37, 42, 43-44, 46, 52, 66, 73, 78, 83,
 4 85, 90, 93 (referencing specifically the Products’ “packaging”). In such circumstances, “the
 5 district court may treat such a document as part of the complaint, and thus may assume that its
 6 contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at
 7 908. Indeed, courts routinely take judicial notice of product packaging in false advertising suits.
 8 *See, e.g.*, *Samet v. Procter & Gamble Co.*, No. 5:12-CV-01891 PSG, 2013 WL 3124647, at *2
 9 n.21 (N.D. Cal. June 18, 2013); *Dvora v. General Mills, Inc.*, No. CV 11-1074-GW, 2011 WL
 10 1897349, at *2 (C.D. Cal. May 16, 2011); *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK,
 11 2013 U.S. Dist. LEXIS 129241, at *11-13 n.1 (N.D. Cal. Sept. 6, 2013).

13 **Second**, and independently, the Court may appropriately take judicial notice of the
 14 Products’ packaging because Plaintiffs themselves attached images of Huggies® Pure & Natural
 15 Diapers and Huggies® Natural Care Baby Wipes packaging to the Complaint. *See* Compl. ¶¶
 16 23, 33. Under the Federal Rules of Civil Procedure, “[a] copy of a written instrument that is an
 17 exhibit to a pleading is a part of the pleading for all purposes.” Fed. R. Civ. P. 10(c); *see also*
 18 *Ritchie*, 342 F.3d at 908 (“Certain written instruments attached to pleadings may be considered
 19 part of the pleading.”). As discussed in Defendants’ Motion to Dismiss, the images Plaintiffs
 20 inserted into the Complaint contain only incomplete (and largely illegible) representations of the
 21 Products’ packaging. Exhibits A and B provide a clearer and more comprehensive
 22 representation of the package labeling. *See McKinniss v. Sunny Delight Bevs. Co.*, No. CV 07-
 23 02034-RGK, 2007 U.S. Dist. LEXIS 96108, at *10 n.1 (C.D. Cal. Sept. 4, 2007) (taking judicial
 24 notice of the “high-resolution color exemplars of the labels submitted by Defendant” because
 25 “these exemplars better portray the packaging than the black and white photocopy attached to
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1 Plaintiffs' [First Amended Complaint]”).

2 For all the foregoing reasons, Defendants respectfully request that the Court take judicial
3 notice of Exhibits A and B.

4 DATED: September 17, 2013

5 KING & SPALDING LLP

6 By: /s/ Timothy T. Scott

7 TIMOTHY T. SCOTT

8 GEOFFREY M. EZGAR

9 STEPHEN B. DEVEREAUX (*pro hac vice* to be filed)

10 MADISON H. KITCHENS (*pro hac vice* to be filed)

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